No. 13115

In The

United States Court of Appeals

For the Ninth Circuit

R. M. PERRIN and MARY PERRIN, *Appellants*,

vs.

ALUMINUM COMPANY OF AMERICA and C. S. THAYER,

Appellees.

Appellants' Reply Brief

Appeal from the United States District Court for the Western District of Washington, Southern Division.

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Appellee's Brief contains only two points which were not raised and discussed in Appellants' Brief.

First, appellees claim that failure to comply with Rule 7(b)(1) Fed. R. Civ. P. was sufficient ground for denial of appellants' motion. It is sufficient to state the grounds in the Notice of Motion (Rule 52(b)(1) Fed. R. Civ. P.) and it would seem that the grounds of the motion might be stated in a memorandum accompanying the motion. The obvious purpose of Rule 7(b)

(1) is to require the moving party to give his adversary fair notice. *2 Moores Federal Practice* (2d Ed.) p. 1513 If that purpose is accomplished it would seem that there was a fair compliance with the Rule.

The Record indicates that appellants accompanied their motion by a Memorandum in Support of Motion (R 65) and that appellees filed a Memorandum in Opposition to the Motion to Vacate (R 65). While the Record on this appeal does not indicate the contents of that memorandum, it is a fair assumption that it did state the grounds upon which appellants based their claim to relief.

It is also reasonable to assume that appellees understood the grounds upon which appellants claimed to be entitled to the requested relief since no objection was made to the form of the motion and this point is raised for the first time on this appeal. It is also worth noting that in *Steingut v. National City Bank of New York*, 36 F. Supp. 486 (E.D. N.Y. 1941) (the only authority cited by appellees on this point), the opposing party objected to the form of the motion because it failed to state the grounds upon which it was made. In spite of the objection, no attempt was made to comply with the Rule. The opinion indicates that the decision is not one which would generally be made but was lim-

ited to the unusual situation in that case. At page 487 of the opinion Judge Mascowitz said,

> "The court would ordinarily excuse the failure to comply with this rule if it were inadvertent, but such is not the case here."

That is certainly a far different situation than is present in the instant case. If the form of the motion was defective (which is doubtful considering that it was accompanied by a Memorandum in support of the motion) there is nothing to indicate that the error was more than inadvertence. Although it may be better practice to state the grounds in the motion, it appears that there was a sufficient compliance with the Rule in this case and, in any event, appellee did not object to the form of the motion and should not now be allowed to claim that it was defective.

The second point raised by appellees is that appellants did not make known to the court the action which they desired the court to take and cannot now raise the issue. (Appellees' Brief p. 13.) Apparently the issue to which appellees refer is the failure of the District Court to make findings of fact on appellants' motion to remand.

Appellees rely upon Rule 46 Fed. R. Civ. P. as authority for the proposition that a party is not entitled to assert on appeal an objection which it did not make below. Two cases are cited by appellees on page 13 of their brief in support of their theory but neither of them deal with objections to the failure to make findings of fact and no such case can be found because Rule 52 provides that "Requests for findings are not necessary for purposes of review." It is the duty of the trial court to make findings and failure by a litigant to request them cannot prejudice him. 5 *Moore's Federal Procedure* (2d Ed.) p. 2675. In *Monaghan v. Hill,* 140 F. 2d 31, 33 (9th Cir. 1944) this court held that Rule 46 Fed. R. Civ. P. does not apply to the acts required by Rule 52 Fed. R. Civ. P. In accord is *Cafritz v. Koslow,* 167 F. 2d 749 (App. D.C. 1948).

Appellants disagree with most of the statements and propositions advanced by appellees in their brief and feel that the authorities cited by them do not support those propositions, but it is not proposed to debate each of them in this brief. However, appellants call the attention of the court to a few of the statements and propositions which are not supported by fact or authority.

On page 2 of their brief appellees say that "the court determined that appellee C. S. Thayer, a resident of Washington, was fraudulently and improperly joined as a defendant." The record does not indicate that such a determination was made by the Court.

On page 5 and page 9 appellees say that the court had previously determined the factual issue involved in the removal proceeding. The record does not indicate the court's determination of this factual issue.

The cases cited on page 6 deal with collateral attack and relitigation of issues decided on a former appeal. There is no question of collateral attack in this proceeding and the only issue on the former appeal was whether the appeal was timely filed. An adverse decision on that point does not prevent appellant from seeking relief on proper grounds under Rule 60, Fed. R. Civ. P.

In footnote 7 on page 7 of their brief appellees argue that the Washington two-year statute of limitations applies. However, they refuse to recognize that the tort is alleged to have occurred in Oregon and that the action, under Oregon law, is of the type covered by the Washington three-year statute of limitations. Appellees cite here, as they did in the District Court, only cases involving torts which occurred in Washington and

which have no application to the issue presented in this case.

In the second and third point in their Appendix appellees rely upon the affidavits prepared by counsel for appellees and signed by personnel in the clerk's office. However, the statements contained in appellants' brief, and criticized by appellees, are fully supported by the transcript of the proceedings in the District Court on February 1, 1951. Referring to the notice of appeal the clerk said, "if it did come in Monday afternoon, it was opened Tuesday" (R 41).

The Record refutes the statement made in paragraph 8 of Appellees' Appendix and indicates that the court did receive erroneous impressions of fact.

In *Cornucopia Gold Mines v. Lochen*, 150 F. 2d 75 (9th Cir. 1945), cert. denied 276 U.S. 763, cited by appellees on page 15 of their brief, the court said that the result would have been the same and liability would have been imposed even if the trial court had found plaintiff to be a trespasser as was requested. There is no similarity between that case and the one before this court where the finding which appellants seek would require the case to be remanded to the state court. Nor is there any foundation for the proposition stated on page 15 that Judge Leavy's ruling would have

been the same even if he had made findings. The record itself is the best refutation of that assertion. The petition for removal (R 11) and the affidavit of C. S. Thayer (R 16) allege on information and belief that appellants knew that defendant C. S. Thayer was not liable. (Actually the allegations are that neither defendant was liable.) Based on the evidence presented the District Court could have prepared no finding of fraudulent joinder. An attempt to state such a finding would have disclosed to the court that it had been misled.

CONCLUSION

Appellants contend that the record does not contain any evidence of fraudulent joinder. The District Court made no finding of fact on that issue although required to do so by Rule 52. Without a finding of fraudulent joinder there is no basis for the District Court's jurisdiction. No such finding could be made and the District Court's error would not have occurred if it had followed the mandatory requirement of Rule 52 Fed. R. Civ. P. by making findings of fact. Since the order denying Remand was improperly made as a result of the court's failure to determine the facts in the prescribed manner, the District Court should have vacated that order upon appellants' motion. Refusal to vacate the order denied

substantial rights to appellants and constituted an abuse of discretion.

Appellants respectfully submit that this court should remand this case to the District Court with instructions to remand it to the state court from which it was improperly removed.

Respectfully submitted,

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